85-384

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANN BROWN,

Petitioner,

—against—

FERRO CORPORATION, ADOLPH POSNICK, JAMES M. DAWSON, CLYDE A. MACFIE, HENRY PIPER, ROBERT WHITE, ALBERT C. BERSTICKER, WILLARD BROWN, ROBERT GINN, DONALD NOBLE, KEVIN O'DONNELL, and MILTON ROSENTHAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented

Whether the court below properly invoked the doctrine of ripeness where the effect of such doctrine may permanently preclude judicial review of a shareholders' derivative suit challenging the legality of certain "golden parachute agreements?"

Whether a suit challenging "golden parachute agreements" adopted by a corporation is ripe for adjudication, where pursuant to the agreements, the corporation has already placed at least $1.5 million into an "irrevocable" escrow account to secure payments under the agreements, thereby removing those funds from corporate use?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cases	iii
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Preliminary Observations	3
Respondents' Adoption of the Golden Parachutes	5
Proceedings Below	9
The District Court	9
The Court of Appeals	11
Reasons for Granting the Writ	14
The Doctrine of Ripeness Was Improperly Applied to Petitioner's Claim	14
The Establishment of the Irrevocable Escrow Account Constitutes Present Damage to Ferro	20
Conclusion	23

TABLE OF CASES

	Page
Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)	14
Barson v. Pioneer Savings & Loan Co., 163 Ohio St. 424, 127 N.E.2d 614 (1955)	21
Lewis v. Anderson, 477 A.2d 1040 (Del. 1984)	17
Mills v. Esmark, 544 F. Supp. 1275 (N.D. Ill. (1982)	21-22
Overberger v. BT Financial Corp., Fed. Sec. L. Rep. (CCH) ¶ 92,221 (W.D. Pa. 1985)	18
Toilet Goods Association v. Gardner, 387 U.S. 158 (1967)	16
Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981) cert. denied 455 U.S. 939 (1982)	16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Ann Brown requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on June 7, 1985.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit, reported at 763 F.2d 798 (6th Cir. 1985), is annexed as Appendix C. The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, not officially reported, is annexed hereto as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on June 7, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Involved

This case involves the application of state common law fiduciary standards and the judicially created doctrine of "ripeness."

Statement of the Case

Preliminary Observations

The corporate use of "change of control" defensive tactics to fend off hostile takeover bids has dramatically increased within the recent past. These measures, including the "golden parachutes" challenged here, are adopted by the directors of a corporation involved in a struggle for control, and are triggered in the event the unfriendly acquiror corporation prevails.[1] Agreements incorporating change of control provisions have been subject to considerable criticism by legal scholars and representatives from

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[1] In the event of such a change of control, "golden parachute" agreements generally provide for substantial cash termination payments to covered executives.

all branches of government.[2] In general, the judiciary has decided the legality of such fully executed agreements prior to any change of control.

The decision of the Sixth Circuit declining to adjudicate the change of control agreements challenged here on the grounds of ripeness stands in stark contrast to these prior judicial decisions. More importantly, since a shareholders' derivative claim may be extinguished subsequent to a change of control,

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[2]For, example, it has been stated that the adoption of golden parachute agreements during a hostile takeover attempt:

> . . .presents the appearance of self-dealing on the part of management at a moment of corporate vulnerability and a failure to place the interests of shareholder foremost.

See, SEC Advisory Committee on Tender Offers, "Report and Recommendations," July 8, 1985, p.40 (published as an Addendum to 1028 CCH Fed. Sec. L. Rep. (July 15, 1983).

the Sixth Circuit decision establishes a dangerous precedent of completely removing these agreements from judicial review at any time.

Respondents' Adoption of the Golden Parachutes

The fourteen "golden parachute" agreements challenged here were adopted by the directors of Ferro Corporation ("Ferro"), without shareholder approval, in June 1981, in response to what they perceived as a hostile takeover by Crane & Company ("Crane"), which had purchased over five percent of Ferro's outstanding shares. The agreements provided that if any one of the covered executives left the company for any reason within two years after a change of control (defined as the acquisition by a third party of 25% or more of Ferro's stock), that executive would receive a lump sum payment principally consisting of: (a) two to

three years' pay plus; (b) the present value of the retirement benefits to which the executive would have been entitled had he remained in the employ of the company for the same number of years used in computing the payment above; and (c) the cash value of all outstanding stock options held by him on the date of his departure.

The challenged agreements also contained a number of particularly onerous provisions not customarily found in other corporations' golden parachute agreements. The agreements made no attempt to limit payouts to those situations where the executive was removed by "hostile management" due to differences in business philosophy; and, benefits were payable even though the executive was fired for cause or voluntarily resigned for personal or other reasons, including the retention of more lucrative employment elsewhere.

The agreements neither required a covered executive to seek similar employment, nor did they provide that benefits would be reduced, in whole or part, if an executive were to obtain other, comparable (or even better) employment. In addition, the agreements failed to prohibit a covered executive from obtaining employment with a Ferro competitor, or from providing that competitor with, or using for his own benefit, proprietary information gained while employed at Ferro.

The golden parachute agreements were funded and secured through the establishment of a "irrevocable" escrow account. Pursuant to an escrow arrangement required by the golden parachute agreements, Ferro has already deposited over $1,500,000 in escrow. These funds cannot be withdrawn, loaned, borrowed or hypothecated by Ferro, and are beyond its

general corporate control. Under the terms of the golden parachute agreements, Ferro continues to make payments to the irrevocable escrow account.

In sum, petitioner, a Ferro shareholder, claimed that the golden parachute agreements represented a waste of corporate assets for the self-enrichment of the covered executives of Ferro, and sought to improperly deter potential acquirors by requiring, upon a change of control, the payout of millions of dollars to those executives, thereby substantially increasing the cost of acquisition. Moreover, the agreements actually provided a strong, if not irresistible, financial incentive for Ferro's management to leave their jobs immediately upon a "change of control" and harvest the enormous benefits provided to them under their golden parachutes. Ferro's directors, defendants in this

action, without regard to the detrimental effect such action would have on Ferro's remaining shareholders, apparently hoped that the prospect of all of Ferro's top management opening their "golden parachutes" and leaving the executive suite bare would cause a potential acquiror's ardor for the company to dramatically wane. Finally, the golden parachute agreements were constructed so that if all defensive maneuvers failed, Ferro's top executives could solace themselves with the multi-million dollar payments they were entitled to receive upon a change of control.

Proceedings Below

The District Court

Shortly after the public disclosure of the enactment of the golden parachute agreements, petitioner commenced

this derivative action pursuant to Fed. R. Civ. P. 23.1 in the United States District for the Northern District of Ohio, Eastern Division. Petitioner alleged that, inter alia, Ferro's adoption, at the behest of its directors, of the golden parachute agreements and other arrangements linked to a change of control, constituted a waste and spoliation of Ferro's assets and a breach of fiduciary duties owed by the directors to Ferro and its shareholders. The complaint sought, inter alia, judgment adjudicating the agreements to be null and void and an order enjoining Ferro and the directors from implementing the agreements.

In ruling upon respondents' motion for summary judgment, the District Court expressed its concern with the agreements by noting that if a slate of disinterested directors assumed control they "would probably be stronly inclined

to challenge the validity of any such payments [under the agreements]. . ." (A. 5a), and further stated that the present directors might decide "to alter significantly or even to eliminate the current severance agreements before any potential change of control occurs . . . ." (A. 24a) Despite its misgivings with the substance of the challenged agreements, the District Court dismissed the complaint, without prejudice, on the grounds that since there had not yet been a change of control, Ferro had not yet been damaged and petitioner's claims were therefore not ripe for determination.

The Court of Appeals

In the majority opinion of the Sixth Circuit, the Honorable Horace W.

Gilmore[3] concluded that the District Court did not abuse its discretion in declining to adjudicate the validity of the golden parachute agreements. Judge Gilmore agreed with the District Court's position with respect to damages and ripeness and stated that although Ferro had already placed substantial funds into an irrevocable escrow account, any damages resulting from that action was nominal since Ferro continued to receive interest on that investment.

In a concurring opinion, Circuit Judge Wellford expressed his dissatisfaction with the golden parachute agreements, stating that ". . . it is difficult to discern any advantage to shareholders in

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[3]As noted, infra, Circuit Judge Wellford concurred with Judge Gilmore in a separate opinion, and Circuit Judge Merritt dissented.

the broad benefits bestowed on certain corporate officials under the severance agreements in dispute . . ." (A. 37a). (Emphasis in original) Despite his serious reservations about the terms of the agreements, Judge Wellford concurred with Judge Gilmore that petitioner's claims were not yet ripe for adjudication.

Circuit Court Judge Merrit dissented, finding that: (a) the funds placed in the irrevocable escrow account by Ferro constituted present damage to the corporation; (b) the the ripeness doctrine did not apply to petitioner's claims, since these claims did not involve constitutional issues or challenge the validity of legislative or administrative action, the areas customarily subject to the ripeness doctrine; and (c) even if the ripeness doctrine did apply to the type of claims raised by petitioner, its application here could result in

petitioner losing the right to challenge these agreements at any time.

Reasons for Granting the Writ

The Sixth Circuit Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court, And Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision

The Doctrine of Ripeness Was Improperly Applied to Petitioner's Claim

The doctrine of ripeness rests on the values of avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the federal government. 13A C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure ("Wright and Miller") §3532.1 at 120 (2d Ed. 1984). See, also, Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967) (ripeness doctrine utilized ". . .

to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized . . ."") (emphasis supplied). As a result, application of the ripeness doctrine has traditionally been restricted to (a) claims raising constitutional issues; (b) claims by or against federal administrative agencies; or (c) claims attacking state legislation. See, generally, Wright and Miller, §3532.

However, the claims sought to be litigated here do not present any of these issues; instead, petitioner requested the district court to determine the legality under Ohio law of the adoption and enactment of certain fully executed agreements, and Ferro's related payment of substantial funds into an irrevocable escrow account.

The separation of power concerns which underlie the ripeness doctrine are not present here, and its application by the Sixth Circuit to this type of litigation does not serve any of the purposes the ripeness doctrine was designed to promote.

Furthermore, assuming arguendo that the ripeness doctrine is applicable to petitioner's non-constitutional type of claims, the "balancing test" utilized by courts in assessing "the hardship to the parties if judicial relief is denied" (Young v. Klutznick, 652 F.2d 617, 625 (6th Cir. 1981) cert. denied 455 U.S. 939 (1982), citing Toilet Goods Association v. Gardner, 387 U.S. 158, 162 (1967)) favors present resolution of petitioner's claims. The hardship here is that the application of the ripeness doctrine to petitioner's and other shareholder derivative claims challenging change of control provisions may effectively eliminate the opportunity

to challenge the legality of such agreements at any time.

Under Ohio statutory law, a shareholder's derivative action is the property right of the corporation on whose behalf it is asserted, and all "property of every description" of a merged corporation is possessed by the surviving or new corporation to which it is merged. O.R.C. §1701.82. Other courts, in interpreting laws under similar statutes, have held that a target company's former shareholders had no standing after the target became the wholly owned subsidiary of its acquiror to bring a derivative action on behalf of the corporation. These courts have found that since only the parent then held stock in its wholly owned subsidiary, only the parent could maintain a derivative action against the subsidiary's former officers. Lewis v. Anderson, 477 A.2d 1040 (Del. 1984). See,

also Overberger v. BT Financial Corp., Fed. Sec. L. Rep. (CCH) ¶ 92,221 (W. D. Pa. 1985).

Under this line of authority, the majority position of the Sixth Circuit, which refused to adjudicate petitioner's claim on the grounds of ripeness, would forever preclude Ferro shareholders from challenging the golden parachute agreements. As noted by Judge Merritt in his dissent:

> Thus, under the majority's decision, the shareholder is barred by the ripeness doctrine from challenging the parachutes before an acquisition or merger, and barred by the statutory passage of corporate property rights from challenging the parachutes after the acquisition or merger. A derivative action challenging the golden parachutes could only be brought by the acquiring corporation, but the practical likelihood of this is slim; the possibility that the acquiror would challenge the golden parachutes would only stiffen target management's opposition and thereby negate a primary reason for creating the

golden parachutes. (A. 40a-41a.)

Furthermore, the possibility of the acquiror challenging these agreements here is effectively eliminated by virtue of the irrevocable escrow account, the purpose of which was to specifically prevent the acquiror from stopping payments to executives upon a change of control. Thus, neither shareholders nor the acquiring corporation will be able to challenge these agreements after a change of control has occurred.

Under circumstances such as those presented here, where denial of court intervention at this time is tantamount to a denial of judicial review at any time, the balance of "real hardship" tips decidedly in favor of petitioner and against the invocation of the ripeness doctrine.

The Establishment of the Irrevocable Escrow Account Constitutes Present Damage to Ferro

The Sixth Circuit also erred in its application of the ripeness doctrine by concluding that the multi-million dollar payment by Ferro into the "irrevocable" escrow account did not constitute present damage to the corporation. Instead, it ruled that although these funds were beyond normal corporate control, and could not be withdrawn, lent, borrowed upon or hypothecated, Ferro has and ". . . continues to receive a healthy return on its investment . . ." and therefore has not been damaged. (A. 36a)

However, the fact that interest is being earned on the escrow funds is irrelevant. As noted by Judge Merrit:

> [T]he foregone opportunity to put the funds to their most profitable use constitutes a tangible, real and continuing injury to the Corporation. In this allegation of injury,

> [petitioner] has clearly met the requirement that loss or damage to the Corporation must be claimed in order to maintain a shareholder's derivative action. 13 W. Fletcher, Cyclopedia of the Law of Private Corporations, §5947 at 83 (rev. perm. ed. 1984); Barson v. Pioneer Savings & Loan Co., 163 Ohio St. 424, 127 N.E.2d 614 (1955)). (A. 38a).

The majority opinion of the Sixth Circuit erroneously concluded that the decision in Mills v. Esmark, 544 F. Supp. 1275 (N.D. Il. 1982) presented a factual situation regarding the issue of the existence of damages which was "nearly identical" to the facts in this action. (A. 36a) There, the district court's limited holding was that mere allegations that certain golden parachute agreements had been "recommended" did not state a claim since "[p]laintiffs fail[ed] to allege that Esmark and its principal officers actively entered into the agreements at issue." Mills v. Esmark,

544 F.Supp. at 1290. (Emphasis supplied.) The facts in Mills bear no relationship to those presented here where the execution of the severance agreements and the ongoing funding of the irrevocable escrow accounts have been alleged and are factually undisputed.

Conclusion

For the reasons stated above, the Court is respectfully requested to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Dated: September 4, 1985

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF DISTRICT COURT
FILED NOVEMBER 9, 1983

N BROWN,	)	CASE NO. C82-3148
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	MEMORANDUM
RRO CORP., et al.,	)	OF OPINION
	)	
Defendants.	)	

Filed November 9, 1983

On November 12, 1982, plaintiff, n Brown, filed the above-captioned case ainst defendants, Ferro Corporation erro) and its eleven (11) directors. own is a citizen of New Jersey, and rro is an Ohio corporation with its incipal place of business in Cleveland, io. The directors of Ferro are all tizens of states other than New Jersey.

Jurisdiction is invoked under 28 U.S.C. § 1332. This action is brought pursuant to Fed.R.Civ.P. 23.1 as a derivative action on behalf of Ferro.[1] In her com-

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[1] Fed.R.Civ.P. 23.1 provides:

> Derivative Actions by Shareholders
>
> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and,

(footnote continued on following page)

plaint, Brown challenges four decisions made by the directors of Ferro: (1) the

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(footnote continued from previous page)

> if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

(Emphasis added). The purpose of the emphasized portions of Rule 23.1 is to give the corporation an opportunity to bring a suit on its own behalf and "thus to allow the directors a chance to occupy their normal status as conductors of the corporation's affairs." Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445, 450 (2d Cir. 1978). However, "a demand need not be made...where such a demand would be futile, useless, or unavailing

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adoption of a Severance Agreement Program that would provide payments to certain

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...And where the directors and controlling shareholders are antagonistic, adversely interested, or involved in the transaction attacked, a demand on them is presumptively futile and need not be made." 590 F.2d at 450 (citations omitted). Accord Clark v. Lomas & Nettleton Financial Corp., 625 F.2d 49, 53 (5th Cir. 1980), cert. denied, 450 U.S. 1029, 101 S.Ct. 1738 (1981); Nussbacher v. Continental Illinois National Bank & Trust Co., 518 F.2d 873 (7th Cir. 1975), cert. denied, 424 U.S. 928, 96 S.Ct. 1142 (1976); In re Kauffman Mutual Fund Actions, 479 F.2d 257, 267-69 (Coffin, J., concurring) (1st Cir.), cert. denied, 414 U.S. 857, 94 S.Ct. 161 (1973).

In her complaint, Brown alleges:

> 14. No demand has been made upon the directors of Ferro prior to the institution of this action and such demand is not required and would be futile for the following reasons:
>
> (a) All of the directors of Ferro are defendants and are alleged to have taken part in, approved of, or acquiesced in the wrongful acts alleged herein.
>
> (b) Such demand would

(footnote continued on following page)

key employees if their employment terminates within two years after a change in control, (2) the amendment of Ferro's

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> require that Ferro's directors sue themselves as they have all participated or acquiesced in the wrongs herein alleged.
>
> (c) This action cannot be properly prosecuted by the directors of Ferro as they have participated in, caused, approved, acquiesced in, and have personally benefited from the acts herein complained of. To permit this action to be prosecuted by the same individuals against whom liability is sought would obviously be a futile act and place the prosecution of this action in hostile hands.

Complaint at ¶ 14. Although the court agrees with Brown that a demand on the directors of Ferro would be futile at this time, it is by no means certain that such a demand would be futile in the event that severance payments are actually made following a "change in control." Indeed, the new directors would probably be strongly inclined to challenge the validity of any such payments. See discussion in text, infra.

Incentive Compensation Plan, (3) the adoption of a Performance Share Plan, and (4) the repurchase of a 22.4 percent block of Ferro's shares from Crane Co. Brown alleges that these decisions served no legitimate purpose of Ferro or its shareholders. On July 22, 1983, the defendants filed a joint motion for summary judgment or, in the alternative, for dismissal. On August 8, 1983, Brown filed a response to the defendants' motion in which she indicated that she only wished to pursue her claims for damages and rescission based upon the adoption of the Severance Agreement Program. Memorandum of Plaintiff in Opposition to Joint Motion of Defendants at 2. For the reasons that follow, the defendants' motion to dismiss is granted with respect to the

adoption of the Severance Agreement Program, and Brown's remaining claims are dismissed pursuant to Fed.R.Civ.P. 41(a)(2).

In her complaint, Brown alleges that the adoption of the Severance Agreement Program "served no valid business purpose or interest of Ferro or its stockholders" and was designed solely (1) to serve the pecuniary interests of the benefiting officers in unreasonable and excessive amounts, (2) to preserve the director's control over Ferro, and (3) to discourage potential acquirers from obtaining a controlling interest in Ferro. Complaint at ¶¶ 29-30. On June 5, 1981, Crane Co. filed a Schedule 13D with the Securities Exchange Commission announcing that it had purchased about 5.55 percent

of Ferro's outstanding shares. In response to the perceived takeover attempt by Crane, Ferro's Compensation and Organization Committee recommended severance agreements for fourteen (14) key executives on July 24, 1981. Ferro's Board of Directors authorized these agreements on the same day by a unanimous vote, with the three officers/directors covered under the Severance Agreement Program abstaining. On July 29, 1981, the Compensation and Organization Committee approved the severance agreements in their final form, pursuant to authority delegated by the Board of Directors.

The severance agreements provide that Ferro will pay severance benefits to certain officers if their employment terminates for any reason other than death

or normal retirement within two years after a "change in control."[2] The principal benefits to be provided to the officers under the severance agreements are: (1) a lump sum severance payment equal to three-years pay for the three officer/directors and two-years pay for the remaining officers covered under the

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[2] Under the severance agreements:

> A change in control will be deemed to have occurred if (i) any person or group acting in concert becomes the beneficial owner of 25% or more of the Company's then outstanding voting securities, or (ii) during any period of two consecutive years, individuals who at the beginning of such period constitute the Board of Directors cease for any reason to constitute at least a majority thereof unless the election or nomination of each new director was approved by the vote of at least two thirds of the directors still in office who were directors at the beginning of the period.

Plaintiff's Exhibit 2 at 8.

program, (2) a lump sum calculated to approximate the present value of the additional retirement benefits to which the officer would have become entitled had he remained in the employment of Ferro for the same number of years used in computing the first lump sum payment, (3) continued participation in Ferro's group life, health, and medical insurance coverage for at least two years, and (4) a cash payment representing the value of all outstanding stock options held by the officers on the date of his termination Id. at 11.

In order to assure that payments will be made in the event they become due, the severance agreements require Ferro to establish escrow accounts in which a percentage of the amounts that would be pay-

able to each of the officers is to be deposited; however, Ferro has no obligation to make any payments to the officer unless (1) the officer remains a Ferro employee until a change in control occurs and (2) the officer's employment terminates within two years after a change in control. Plaintiff's Exhibit 13.

The defendants contend that Brown's claims with respect to the severance agreements must be dismissed because Ferro has sustained no damage. The defendants argue that, under Ohio law, a corporation must first sustain damage before any shareholder's derivative can be maintained. Since payments are contingent upon a "change of control," and since a "change in control" is not presently foreseeable (Affidavit of Adolph

Posnick at ¶ 13), the defendants contend that this action mus be dismissed. Defendants' Joint Motion at 32-37. Although the defendants premise their argument on state law, the related constitutional and judicial question of "ripeness" must also be considered.

Under Article III of the Constitution, parties seeking to invoke the power of federal courts must allege an actual case or controversy. O'Shea v. Littleton, 414 U.S. 488, 493, 94 S.Ct. 669, 675 (1974). "Plaintifis in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.'" 414 U.S. at 493, 94 S.Ct. at 675 (citation and footnote omitted). "Abstract injury

is not enough....The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" 414 U.S. at 494, 94 S.Ct. at 675 (citations omitted). The test for determining whether a complaint presents an "actual controversy" that is ripe for decision is as follows:

> Basically, the question in each case is whether ... there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755 (1972) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512 (1941)). See generally 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3532 (1975 &

Supp. 1983). Moreover, even when jurisdiction is technically present, courts must first determine whether the issues tendered are appropriate for judicial resolution and then assess the hardship to the parties of withholding court consideration. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, __ U.S. __, __, 103 S.Ct. 1713, 1720 (1983); Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515-16 (1967); Young v. Klutznick, 652 F.2d 617, 625-26 (6th Cir. 1981), cert. denied, 455 U.S. 939, 102 S.Ct. 1430 (1982).

In addition, under Ohio law, a prerequisite to any shareholder's derivative suit is that the corporation sustain damage as a consequence of the alleged

wrong. Barson v. Pioneer Savings & Loan Co., 163 Ohio St. 424, 127 N.E.2d 614 (1955). Accord Ohio Drill & Tool Co. v. Johnson, 361 F.Supp. 255, 260-61 (S.D. Ohio 1973), vacated in part, 498 F.2d 186 (6th Cir. 1974), appeal after remand 625 F.2d 738 (6th Cir. 1980). In Ohio Drill & Tool, the district court held that "an essential element of the derivative action is proof that the corporation has in fact been damaged by the actions of such officers and directors." 361 F.Supp. at 260-61. The court added:

> The mere failure to comply with business formalities, negligent or shoddy activities by corporate officers, even actual fraud--these are not actionable in the absence of proven economic detriment to the corporation's interest.

361 F.Supp. at 261 (citations omitted).[3]

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[3] Although the Sixth Circuit Court of

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See generally 13 W. Fletcher, Cyclopedia of Corporations § 5947 (1980). Moreover, in a case involving the law of Delaware, a district court presented with an almost identical fact situation held that a shareholder's challenge of allegedly improper severance agreements was not ripe since payments to the officers covered under the agreements were contingent upon a change in control. Mills v. Esmark,

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Appeals held that the proper measure of damages should be "disgorgement of profits" rather than "out-of-pocket losses suffered by the corporation," 498 F.2d at 190-92, the district court's holding that damage to the corporation is an essential prerequisite to a shareholder's derivative action remains good law. Moreover, in the present case, it is unquestioned that none of the officers of Ferro has received any money under the Severance Agreement Program approved by the Board of Directors. Thus, even if the measure of damages is "disgorgement of profits," Ferro has not been damaged.

Inc., the plaintiffs brought a derivative action on behalf of Esmark, a Delaware corporation, against its directors and some of its officers. The plaintiffs alleged that the individual defendants violated their fiduciary duty when they recommended that agreements be signed between Esmark and each of its principal officers under which each officer's compensation would be guaranteed for two or three years if he lost his position because of a merger or acquisition of Esmark. 544 F.Supp. at 1290. The district court held that this allegation failed to state a claim upon which relief can be granted. The court added:

> Plaintiffs also fail to allege that any merger or acquisition of Esmark has taken place since the agreements became effective. Whether any future merger or acquisition would result in

> a waste or gift of corporate assets because of these purported agreements is a matter not ripe for consideration here.

544 F.Supp. at 1290-91. The court noted, however, that plaintiffs would not be foreclosed "from raising a separate cause of action in the future based on these agreements if and when a merger or acquisition of Esmark takes place." 544 F. Supp. at 1291 n.29 (emphasis added).

In the present case Ferro has not been harmed since, under the severance agreements, payments to the officers are contingent upon a "change in control" that has not occurred and is not presently foreseeable. Although Brown makes several arguments to the contrary, they are without merit. First, she contends that Ferro has already been harmed because it has made irrevocable payments into es-

crow accounts as security for its potential liability. However, the funds in escrow are assets of Ferro unless and until (1) a change in control occurs, (2) Ferro is obligated to make payments to an officer covered, and (3) Ferro fails or refuses to meet its obligations. Ferro continues to direct the investment of its funds in these escrow accounts, from which it earns substantial income.[4] Brown's second argument is that "the very uncertainty as to the validity and/or enforceability of the agreements results in damage to Ferro" because of the deterrent effect on potential purchasers.

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[4] Moreover, these escrow accounts will not continue indefinitely because as each of the fourteen officers retires or otherwise leaves the employ of Ferro, that officer's potential right to payment is extinguished.

Memorandum of Plaintiff in Opposition to Joint Motion of Defendants at 39. This argument was rejected in Mills v. Esmark, Inc., supra, and this court fails to see how these allegations constitute either economic detriment to Ferro or fraudulent enrichment to the officers and directors of Ferro. See Ohio Drill & Tool Co. v. Johnson, supra, 498 F.2d at 190-91; Barson v. Pioneer Savings & Loan Co., supra. Finally, Brown contends that declaratory relief would be appropriate under 28 U.S.C. §§ 2201 and 2202 and Fed.R.Civ.P. 57, however, Brown does not request declaratory relief in her complaint. More important, the potential liability to Ferro under the severance agreements is simply not "of sufficient immediacy and reality to warrant the issuance of a

declaratory judgment." Lake Carriers' Assn. v. MacMullan, supra, 406 U.S. at 506, 92 S.Ct. at 1755.

In addition, for a number of reasons, Brown's claims with regard to the severance agreements are not ripe for decision. In Metzenbaum v. Federal Energy Regulatory Commission, 675 F.2d 1282 (D.C. Cir. 1982), the D.C. Circuit Court of Appeals explained the issue of ripeness:

> "Ripeness doctrine is drawn both from Article III limitations on judicial power and discretionary reasons of policy for refusing to exercise existing power. The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all."

675 F.2d at 1289 (quoting 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3532, at 237-38 (1975)). Dis-

missal for lack of ripeness is appropriate when "[n]othing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative." Socialist Labor Party v. Gilligan, 406 U.S. 583, 589, 92 S.Ct. 1716, 1720 (1972). It is therefore appropriate for this court to determine whether the issues tendered are appropriate for judicial resolution and then assess the hardship to the parties of withholding court consideration. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, supra; Abbott Laboratories v. Gardner, supra; Young v. Klutznick, supra. As stated earlier,[5] Fed.R.Civ.P. 23.1 re-

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[5] See Note 1, supra.

quires the plaintiff to allege "with particularity" either (1) his or her effort "to obtain the action he [or she] desires from the directors," or (2) his or her reasons "for not making the effort." The purpose of this requirement is to give the corporation an opportunity to bring a suit on its own behalf and to allow the directors a chance "to occupy their normal status as conductors of the corporation's affairs." Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445, 450 (2d Cir. 1978). Although the court agrees with Brown that a demand on the directors would be futile at this time, it is by no means certain that such a demand would be futile in the event that severance payments are actually made following a change in control. In fact, the

new board of directors might well be inclined to challenge the validity of these payments on their own. For the court to permit a derivative action now when (1) the threatened injury to the corporation is remote, and (2) the directors might very likely bring their own action should payments actually be made, would undermine the policy of allowing the directors "a chance to occupy their normal status as conductors of the corporation's affairs." Elfenbein v. Gulf & Western Industries, Inc., supra. In addition, the directors of Ferro might decide to alter significantly or even to eliminate the current severance agreements before any potential change in control occurs, thus obviating the need for any resolution by this court.

In summary, the court finds that Brown's claims with regard to the severance agreements are inappropriate for judicial resolution under the present circumstances and that none of the parties will be harmed as a result of the court's withholding consideration of the severance agreements. Accordingly, Brown's claims with regard to the severance agreements are dismissed without prejudice, see Mills v. Esmark, Inc., supra, 544 F.Supp. at 1291 n. 29, and her remaining claims are dismissed pursuant to Fed.R.Civ.P. 41(a)(2).

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

APPENDIX B

ORDER OF DISTRICT COURT
FILED NOVEMBER 9, 1983

ANN BROWN,	)	CASE NO. C82-3148
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	O R D E R
FERRO CORP., et al.,	)	
	)	
Defendants.	)	

Filed November 9, 1983

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the defendants' motion for summary judgment or, in the alternative, for dismissal is granted with respect to the adoption of the Severance Agreement Program, and the plaintiff's remaining claims are dismissed pursuant to Fed.R.Civ.P. 41(a)(2).

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

APPENDIX C

OPINION OF CIRCUIT COURT
DECIDED AND FILED JUNE 7, 1985

No. 84-3102

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANN BROWN,
Plaintiff-Appellant,

v.

FERRO CORP., et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed June 7, 1985

Before: MERRITT and WELLFORD, Circuit Judges; and GILMORE, District Judge.*

GILMORE, District Judge, delivered the opinion of the Court. WELLFORD, Circuit Judge, (p. 10); delivered a concurring opinion. MERRITT, Circuit Judge, (pp. 11-14), delivered a dissenting opinion.

GILMORE, District Judge. This is an appeal in a stockholder's derivative suit from a district court decision dismissing the suit without prejudice for lack of ripeness and failure to show that the corporation has suffered actual damages as a result

* The Hon. Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

of the adoption of a severance agreement program. For the following reasons, the district court is affirmed.

I

Plaintiff is the owner of ten shares of common stock of defendant Ferro Corporation. Ferro Corporation is a nominal defendant, and the principal defendants are eleven members of Ferro's Board of Directors. Jurisdiction rests on diversity, and Ohio law governs.

While plaintiff's original complaint challenged several decisions made by Ferro directors, only one of these decisions, the adoption of a severance agreement program, is the subject of this appeal. The severance agreement program is what is commonly known as a "golden parachute" agreement, that is, an agreement between the officers and the corporation providing that in the event of a take-over and change of leadership, the officers can "bail out" and retain very favorable benefits from the corporation.

The severance agreements were adopted in response to a perceived take-over attempt by Crane Company following Crane's filing of a Schedule 13(D) with the Securities and Exchange Commission to disclose its purchase of 5.55 percent of Ferro's outstanding shares. Ferro's Compensation and Organization Committee, comprised of five outside directors, recommended the severance agreements for fourteen key executives in July 1981. These were authorized by Ferro's Board of Directors by unanimous vote, with the three inside directors who were covered by the agreement abstaining.

The severance agreements require Ferro to pay severance benefits to certain officers if their employment is terminated for any reason other than death or normal retirement within two years after a "change in control."[1] The benefits include:

---

[1] The agreements provide that:

A change in control will be deemed to have occurred if

(1) a lump-sum severance payment equal to three years' pay for three officers/directors and two years' pay for the remaining officers; (2) a lump-sum payment calculated to approximate present value of the additional retirement benefits; (3) continued participation in Ferro's Group Life, Health, and Medical Insurance coverage for at least two years; and (4) a cash payment representing the value of all outstanding stock options held by the officers on the date of termination.

The agreements require Ferro to establish an irrevocable escrow account and to make deposits reflecting a certain percentage of the amounts that would be payable to each officer. Under the provisions of the agreements, as well as the terms of the escrow agreement, the funds on deposit remain Ferro's unless and until a change in control occurs. Under the escrow agreement, Ferro directs the investment of the funds and receives all income derived from these investments.

To date, approximately $1,500,000 has been deposited into an escrow account, and deposits into the account continue. None of the key officers subject to the agreement left Ferro during the turbulent period in which Crane's holdings threatened uncertainty as to the future course of the corporation. No change of control has occurred, no monies have been paid out of the accounts to any officers, and the agreements remain in full force and effect. The funds have been invested in certificates of deposit earning from 8 to 14 percent interest.

In her complaint, plaintiff alleged that the adoption of the severance agreement program served no valid business

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(i) any person or group acting in concert becomes the beneficial owner of 25% or more of th Company's then outstanding voting securities, or (ii) during any period of two consecutive years, individuals who at the beginning of such period constitute the Board of Directors cease for any reason to constitute at least a majority thereof unless the election or nomination of each new director was approved by the vote of at lease two thirds of the directors still in office who were directors at the beginning of the period.

purpose or interest of Ferro or its stockholders, and was designed solely to serve the pecuniary interest of the directors involved, to preserve the directors' control over Ferro, and to discourage potential acquirers from obtaining a controlling interest in Ferro. Plaintiff claims that the corporation has been damaged as a result of the payment of nearly $1,500,000 into the irrevocable escrow account as it cannot withdraw, lend, borrow upon, or hypothecate these escrowed funds.

On defendant's motion for summary judgment, the district court dismissed the claim without prejudice, holding that (1) the complaint did not present an "actual case or controversy" that is ripe for decision, as required by Article III of the Constitution, and (2) no actual damage to the corporation was shown, as required before a stockholder's derivative suit can be maintained under Ohio law. The trial court held:

> In the present case Ferro has not been harmed since, under the severance agreement, payments to the officers are contingent upon a 'change in control' that has not occurred and is not presently foreseeable. Although Brown makes several arguments to the contrary, they are without merit. . . .
>
> In summary, the court finds that Brown's claims with regard to the severance agreements are inappropriate for judicial resolution under the present circumstances and that none of the parties will be harmed as a result of the court's withholding consideration of the severance agreements. (Joint Appendix vol. 1, p. 174, 176.)

On appeal, plaintiff argues that the corporate funds allocated to the irrevocable trust, and thereby removed from the corporation's unrestricted use, are substantial and show sufficient harm to Ferro to enable her to maintain the action. Plaintiff also argues that the threat of harm is imminent and real and that declaratory relief is warranted because the directors failed to include various safeguards in the severance

agreements, as a result of which it is possible for the officers to fabricate a "change of control" solely to obtain the very favorable severance benefits. She also claims that the court erred in finding the matter not ripe for adjudication since judicial avoidance of the claim will result in continued restriction of corporate funds and continued risk of loss of funds through payment of the funds upon a "change of control," whether real or fabricated.

Plaintiff is seeking a judicial determination that the severance agreements were adopted by the directors for selfish reasons and not in the best interests of the corporation or its shareholders, and that they would not pass muster under the "business judgment rule" generally used to judge the validity of Board action.[2] The Court recognizes that "golden parachute" agreements of the type adopted by Ferro have been the subject of much controversy in recent years and that recommendation has been made by the SEC to Congress to enact legislation prohibiting their adoption. *See* SEC Advisory Committee on Tender Offers, "Report on Recommendations," July 8, 1983. However, it is not the function of this Court to determine whether the "golden parachute" agreement in this case is an agreement that can be supported under the "business judgment rule" or is acceptable as a corporate practice. This Court expresses no opinion upon the validity of such agreements for the reason that the controversy here is not yet ripe for determination and declaration

---

[2] The "business judgment rule" is invoked by courts to avoid the difficult task of reviewing corporate decision making, and to avoid substituting the court's uninformed opinion for that of experienced corporate management. *See generally Beard* v. *Elster*, 160 A.2d 731 (Del. Ch. 1960); *Cohen* v. *Ayers*, 449 F. Supp. 298 (N.D. ILL. 1978), *aff'd* 596 F.2d 733 (7th Cir. 1979); *Auerbach* v. *Bennett* 47 N.Y.2d 619, 393 N.E.2d 994 (1979); *Denzer* v. *Cunningham*, 498 F. Supp. 682 (E.D. Mich. 1980); *Mills* v. *Esmark, Inc.*, 544 F. Supp. 1275 (N.D. Ill. 1982). *Mills* noted that the rule "reflects the reality that corporate decisions are better left to those who are close to the facts and have the experience to weigh the significance of those facts in an increasingly complex business environment." *Id.* at 1282, n.3.

with reference to such agreements. Further, it does not appear that plaintiff has suffered damages as required by Ohio law before a shareholder derivative suit such as the instant one can be maintained.

II

Article III of the Constitution of the United States requires that parties seeking to invoke the power of federal courts must allege an actual case or controversy. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

> Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (citation omitted) There must be a "personal stake in the outcome" such as to "assure that concrete adverseness which shapens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." (citation omitted) . . . Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. (citation omitted) The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Id. at 493-4.

The ripeness doctrine not only depends on the finding of a case and controversy and hence jurisdiction under Article III, but it also requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances. As the Court in *Pacific Gas & Electric Co.* v. *Engery Resources Commission*, 461 U.S. 190 (1983), pointed out (quoting from *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149, (1967):

> The basic rationale of the ripeness doctrine "is to prevent

> the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . ." In *Abbott Laboratories*, which remains our leading discussion of the doctrine, we indicated that the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."

Id. at 200-1.

Wright, Miller & Cooper, 13A *Federal Practice & Procedure*, § 3532.1, at p. 114, pointedly observe that:

> Ripeness doctrine serves the same general purposes as other branches of justiciability theory. The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance. . . . Perhaps more important, decisions involve law making. Courts worry that unnecessary lawmaking should be avoided, both as a matter of defining the proper role of the judiciary in society and as a matter of reducing the risk that premature litigation will lead to ill-advised adjudication. These concerns translate into an approach that balances the need for decision against the risks of decision. The need to decide is a function of the probability and importance of the anticipated injury. The risks of decision are measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision.

Finally, this Court in *Young* v. *Klutznick*, 652 F.2d 617 (6th Cir. 1981), considered the doctrine of ripeness, stating:

> Standing doctrine imposes constitutional limitations on federal courts' jurisdiction. Even when jurisdiction is technically present, however, the Supreme Court has recognized that "problems of prematurity and abstractness . . . may prevent adjudication in all but the excep-

> tional case." (citations omitted) Such questions of ripeness, the court has held, are resolved through two inquiries. Courts must first "determine whether the issues tendered are appropriate for judicial resolution" and then "assess the hardship to the parties if judicial relief is denied at that stage." (citation omitted)
>
> The precise focus of ripeness doctrine is that it is "peculiarly a question of timing." (citation omitted) As Justice Fortas has pointed out in the context of pre-enforcement attacks on administrative regulations, the reason for deferring consideration of abstract or premature claims is to allow government processes "an opportunity to function — to iron out differences, to accomodate special problems. . . . The courts do not and should not pass on these complex problems in the abstract and the general — because these regulations peculiarly depend for their quality of substance upon the facts of particular situations. *We should confine ourselves — as our jurisprudence dictates — to actual, specific, particularized cases and controversies, in substance as well as technical analysis.*" (citations omitted)

Id. 625-6.

III

In resolving the ripeness issue, we cannot conclude that the lower court abused its discretion in declining to adjudicate the validity of the severance agreement program. Throughout this litigation, the only damages that plaintiff has shown is the unavailability of the escrowed funds for unrestricted corporate use and the possible deterrent effect of the existence of the "golden parachute" agreements on future take-over attempts.[3] The district court correctly concluded that the

[3] In her briefs and in oral argument on appeal appellant did not seriously contend that the "golden parachute" agreements would have a deterrent effect on future take-over attempts.

damage resulting from tying up these funds is nominal at best, as the corporation continues to receive a healthy return on its investment. These funds have not been lost to the corporation, but are actually being put to good use.

The fact that all sides have tended to speculate as to the future course of events also supports the district court's decision to decline jurisdiction at this time. Plaintiff suggests that a fabricated contractual "change in control" might be brought about by the officers themselves solely to collect severance benefits. The district court, on the other hand, suggested that a new board of directors might be inclined to challenge the validity of these payments on their own, or that the directors of Ferro might decide to alter significantly or even eliminate the current severance agreements before any change in control occurs, thus obviating the need for court intervention. All of this speculation serves to highlight the fact that it is still unclear how these events will play out, and that judicial intervention at this time would be premature, as the case is not ripe for decision.

Mills v. *Esmark, Inc.* 544 F. Supp. 1275 (N.D. Ill. 1982), presented a factual situation nearly identical to the facts here. The plaintiffs in *Mills* alleged that the directors violated their fiduciary duty when they recommended that severance agreements be signed between Esmark and the principal officers under which each officer's compensation would be guaranteed for two or three years if he lost his position because of a merger or acquisition of Esmark. The court dismissed the claim, stating:

> Plaintiffs also failed to allege that any merger or acquisition of Esmark has taken place since the agreements became effective. Whether any future merger or acquisition would result in a waste or gift of corporate assets because of these purported agreements is a matter not ripe for consideration here.

Id. at 1290-91.

In addition, as the district court pointed out, Ohio law requires as a prerequisite to any shareholder's derivative suit that the corporation sustain damage as a consequence of the allege wrong. *Barson* v. *Pioneer Savings and Loan Co.*, 163 Ohio St. 424, 127 N.E. 2d 614 (1955). Shareholder's derivative actions are governed by Rule 23.1 of the Federal Rules of Civil Procedure, and federal courts apply the law of the state in which the company is incorporated. *Burks* v. *Lasker*, 441 U.S. 471 (1979), *In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075 (6th Cir. 1984). Ferro is an Ohio corporation, and, as pointed out above, Ohio law requires proof of damages to the corporation before a shareholder's derivative action can be maintained.

We agree with the lower court that Ferro has sustained no damages since any payments are contingent upon a change of control and a change of control is not presently foreseeable.

Therefore, because the case is not ripe for adjudication and because the corporation has suffered no damages, the determination of the district court is AFFIRMED.

WELLFORD, Circuit Judge, concurring.

Although it is difficult to discern any advantage to *shareholders* in the broad benefits bestowed on certain corporate officials under the severance agreements in dispute, I concur with Judge Gilmore that the case is not now ripe for adjudication.

MERRITT, Circuit Judge, dissenting. The plaintiff stockholder alleges that Ferro Corporation has been injured because $1.5 million has been removed from the Corporation's unrestricted use and placed in an escrow account to assure that funds are available to cover the "golden parachute" severance agreements. The fact that interest is being earned on the funds in the escrow account is beside the point; the foregone opportunity to put the funds to their most profitable use constitutes a tangible, real and continuing injury to the Corporation. In this allegation of injury, Brown has clearly met the requirement that loss or damage to the Corporation must be claimed in order to maintain a shareholder's derivative action. 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5947, at 83 (rev. perm. ed. 1984); *Barson* v. *Pioneer Savings & Loan Co.*, 163 Ohio St. 424, 127 N.E.2d 614 (1955).

The majority opinion ignores these allegations of immediate injury, and argues that the case is not ripe for adjudication because it is unclear whether a change in control will occur, triggering the golden parachutes, and because a new board may decide to alter or eliminate the golden parachutes at some time in the future. This argument misapplies the ripeness doctrine and has the plain consequence of eliminating any opportunity to challenge the legality of the severance agreements through a shareholder's derivative action.

Under the doctrine of ripeness, " 'problems of prematurity and abstractness' . . . may prevent adjudication in all but the exceptional case." *Young* v. *Klutznick*, 652 F.2d 617, 625 (6th Cir. 1981) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 114 (1976)). The doctrine rests on the "values of avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the federal government." 13A C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3532.1, at 120 (2d ed. 1984). As the Court stated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967), the basic rationale of the ripeness doctrine is to "prevent the courts, through avoid-

ance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies."

The present case involves the validity under Ohio law of agreements calling for funds to be set aside today so that they may be available for future change of control compensation. There is no constitutional issue presented, and this court is not asked to pass upon the validity of legislative or administrative action. The separation of powers concerns justifying the ripeness doctrine are not present in this case, and the majority has taken ripeness principles from their proper context and applied these principles without regard to their underlying rationale.[1]

Moreover, even if the ripeness doctrine did apply here, courts invoking ripeness must first "determine whether the issues tendered are appropriate for judicial resolution," and then "assess the hardship to the parties if judicial relief is denied at that stage." *Young* v. *Klutznick*, 652 F.2d at 625, (citing *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 162 (1967)). The issue presented here is whether the golden parachutes serve a valid business purpose, and there is little question but that this issue is "appropriate for judicial resolution."

Even more importantly, very real hardship may be caused by our failure to consider the validity of the golden parachutes at this time. The hardship is the probable loss of any possibility of challenging the severance agreements through a shareholder's derivative action. A shareholder's derivative action is the property right of the corporation on whose behalf it is asserted, and under O.R.C. § 1701.82, all "property of every description" of a merged corporation is pos-

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[1] Although purportedly relying on ripeness, the decision in *Mills* v. *Esmark*, 544 F. Supp. 1275, 1290 (N.D. Ill. 1982), in fact held that mere allegations that golden parachute agreements had been *recommended* did not state a claim because "[p]laintiffs fail to allege that Esmark and its principal officers *actively entered* into the agreements at issue" (emphasis supplied).

sessed by the surviving or new corporation into which it is merged.[2]

Interpreting a very similar Delaware statute, the Delaware Supreme Court has recently held that a target company's former shareholder had no standing after the target had become the wholly owned subsidiary of its acquiror to bring a derivative action challenging golden parachutes because only the parent held stock in its wholly owned subsidiary and hence only the parent could maintain a derivative action against the subsidiary's former officers. *Lewis* v. *Anderson*, 477 A.2d 1040 (Del. 1984).

The clear implication of the statutory passage of the derivative action to the acquiring corporation is that Ferro Corporation shareholders will lose their opportunity to challenge the golden parachutes after a merger or change of control, even as that same change of control activates the parachutes and delivers up to $5 million in compensation to the departing officers. Thus, under the majority's decision, the shareholder is barred by the ripeness doctrine from challenging the parachutes before an acquisition or merger, and barred by the statutory passage of corporate property rights from challenging the parachutes after the acquisition or merger. A derivative action challenging the golden parachutes could only be brought by the acquiring corporation, but the

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[2] In pertinent part, O.R.C. § 1701.82 provides:

> Effect of merger or consolidation: limitation of action.
>
> (A) When a merger or consolidation becomes effective:
>
> (1) The separate existence of each constituent corporation other than the surviving corporation in a merger shall cease;
>
> . . . .
>
> (3) The surviving or new corporation possesses all assets and property of every description, and every interest therein, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each of the constituent corporations, and all obligations belonging to or due to each of the constituent corporations, all of which are vested in the surviving or new corporation without further act or deed.

practical likelihood of this is slim; the possibility that the acquiror would challenge the golden parachutes would only stiffen target management's opposition and thereby negate a primary reason for creating the golden parachutes.

Consequently, I would hold that ripeness does not bar Brown from bringing the present action, and that the prerequisites for maintaining this derivative action have been met.

APPENDIX D

JUDGMENT OF CIRCUIT COURT FILED JUNE 7, 1985

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 84-3102

ANN BROWN,

Plaintiff-Appellant,

v.

FERRO CORPORATION, et al.,

Defendants-Appellees.

Filed June 7, 1985

Before: MERRITT and WELLFORD, Circuit Judges; and GILMORE, District Judge.

J U D G M E N T

ON APPEAL from the United States

District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: August 28, 1985

COSTS: None

Filing fee.....$
Printing.....$

Total.....$

A True Copy.

Attest:

/s/ Gary E. McCarthy
Deputy Clerk

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No. 85-384 (2)

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

ANN BROWN,
Petitioner,

vs.

FERRO CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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34 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Regardless of whether the District Court and the Court of Appeals correctly decided that this case is not ripe, would the judgments of the courts below have to be affirmed based on the alternative *state law ground* for their judgments which has not been tendered to this Court by Petitioner?

2. Even if the state law ground had been tendered to this Court, should this Court grant certiorari to determine if the District Court and the Court of Appeals correctly decided an issue of Ohio law?

3. In a shareholder's derivative suit challenging severance agreements under which the beneficiaries' rights to any payment have not accrued and may never accrue, where the objections to those agreements are based on speculation as to future events, where it does not appear that the escrow provision of the agreements has caused any damage to the corporation but has conferred substantial benefits upon it, and where postponement of judicial consideration would not preclude adjudication of the issues if they ever become ripe, was it an abuse of the District Court's discretion to hold that the issues of this case are not currently fit for judicial decision?

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 2
COUNTER-STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 5
REASONS FOR DENYING THE WRIT 5

A. The Decisions Below Are Founded Upon An Alternate Ground, Based Wholly On Determination Of Questions Of State Law 5

B. The Decisions Below Are Wholly Consistent With The Decisions Of This Court On Ripeness 8

CONCLUSION 16

RESPONDENTS' APPENDIX:

Memorandum of Opinion and Order, dated January 10, 1984 ..... A1
Ohio Revised Code Section 1701.41 ..... A4
Ohio Revised Code Section 1701.60 ..... A5
Ohio Revised Code Section 1701.78 ..... A6
Ohio Revised Code Section 1701.79 ..... A11

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 9, 14
Berenyi v. District Director, 385 U.S. 630 (1967) 13
Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985) 7, 8
Brown v. Hart, Schaffner & Marx, 96 F.R.D. 64 (N.D. Ill. 1982) 11
Cort v. Ash, 422 U.S. 66 (1975) 7
Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949) 8
General Box Co. v. United States, 351 U.S. 159 (1956) 7-8
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 13
Haring v. Prosise, 462 U.S. 306 (1983) 7
Huddleston v. Dwyer, 322 U.S. 232 (1944) 8
Mills v. Esmark, 544 F. Supp. 1275 (N.D. Ill. 1982) 14, 15
Murrell v. Elder-Beerman Stores Corp., 16 Ohio Misc. 1, 239 N.E.2d 248 (C.P. Mont. Cty. 1968) 9
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 9, 13, 14
Pierson v. Ray, 386 U.S. 547 (1967) 7
Superintendent v. Hill, 105 S. Ct. 2768 (1985) 13
Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967) 14
United States v. Johnston, 268 U.S. 220 (1925) 13
Wolf v. Weinstein, 372 U.S. 633 (1963) 7

Statutes

Ohio Revised Code Section 1701.41 ..... 2, 12
Ohio Revised Code Section 1701.60 ..... 2, 9
Ohio Revised Code Section 1701.78 ..... 2, 12
Ohio Revised Code Section 1701.79 ..... 2, 12

Treatises

13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1984) 8
3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE (2d ed. 1985) 12

Additional Authorities

Rule 23.1, Federal Rules of Civil Procedure 12
Rule 21, Rules of The Supreme Court of The United States 7

No. 85-384

In the Supreme Court of the United States

October Term, 1985

ANN BROWN,
Petitioner,

vs.

FERRO CORPORATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reported at 763 F.2d 798 (6th Cir. 1985), is fully set forth in Petitioner's Appendix at 28a-44a. The Memorandum of Opinion and Order rendered by the District Court for the Northern District of Ohio, Eastern Division, on November 9, 1983, unreported, also is set forth fully in the Petitioner's Appendix at 1a-27a. The subsequent Memorandum of Opinion and Order by the District Court dated January 10, 1984, unreported, was omitted from the Petitioner's Appendix but is set forth in the Respondents' Appendix at A1-A3.

JURISDICTION

The jurisdictional prerequisites adequately appear in the Petition.

STATUTES INVOLVED

Contrary to the statement in the Petition, this case involves Sections 1701.41, 1701.60, 1701.78 and 1701.79 of the Ohio Revised Code, which are set forth herein in the Respondents' Appendix at A4-A13. No constitutional provisions, treaties, other statutes, ordinances or regulations are involved.

COUNTER-STATEMENT OF THE CASE

Petitioner, Ann Brown, as owner of ten shares of common stock of Ferro Corporation ("Ferro"),[1] an Ohio corporation, brought this suit as a shareholder's derivative action against Ferro, nominally, and each of the eleven individuals who were members of Ferro's Board of Directors ("directors") in 1981 and 1982. Ferro and each of the directors are Respondents herein. Federal court jurisdiction rests solely on diversity of citizenship and an amount in controversy of over $10,000 (28 U.S.C. § 1332).

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1. In accordance with Rule 28.1 of this Court, Respondent Ferro states that it has no parent company and that the following is a listing of all subsidiaries (except wholly owned subsidiaries) and affiliates of Ferro: Carboline/Ferro Powder Coatings Co.; Ferro-E.C.A. Electronics Co.; Eurostar S.A.; Ruhr-Pulverlack G.m.b.H.; Ferro Electronics B.V.; Metal Portuguesa S.A.R.L.; Ferro-Compostos Plasticos, Lda; Inmapin Priba, S.A.; Nutriplant I.C.L.; Ferro Ecuatoriana S.A.; De Mateo y Cia., S.A. de C.V.; Metquim, S.A. de C.V.; Quimica Colfer S.A. de C.V.; Ferro de Venezuela, C.A.; Ferro Coatings and Colours Limited; Ferro Enamels (Japan) Ltd.; Nissan-Ferro Organic Chemical Co. Ltd.; Nissan-Ferro Electronics Co. Ltd.; and Ferro Plastics (N.Z.) Ltd.

Although the complaint was much broader, the only issues pursued below by Petitioner involve certain agreements entered into in 1981 between Ferro and fourteen of its key executives ("Severance Agreements").[2] On November 9, 1983, the District Court filed a Memorandum of Opinion and Order which dismissed *without prejudice* all claims challenging the Severance Agreements. On June 7, 1985, the United States Court of Appeals for the Sixth Circuit affirmed.

Both the Court of Appeals and the District Court based their decisions on two *independent* and *distinct* grounds. First, the District Court exercised its discretion to dismiss the case because it was not ripe for adjudication under *federal law*. The Court of Appeals affirmed. (Petitioner's Appendix at 21a, 25a, 32a.) Second, and as an alternate ground based wholly on questions of *state law*, the courts below both held that Ferro had not suffered the damages which are a prerequisite to a shareholder's derivative suit as a matter of Ohio law. (Petitioner's Appendix at 18a, 37a.)

Petitioner seeks certiorari from the decision of the Court of Appeals but does not present in the Petition any

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2. After extensive discovery by Petitioner with respect to all issues set forth in the complaint, the directors and Ferro filed a joint motion for summary judgment on all claims or, in the alternative, to dismiss certain claims ("Joint Motion"). In responding to the Joint Motion, Petitioner stated in a memorandum filed on August 8, 1983, that she abandoned all claims except those challenging the 1981 Severance Agreements. The claims thus abandoned were dismissed by the District Court without prejudice in its Memorandum of Opinion and Order dated November 9, 1983. (Petitioner's Appendix at 1a-27a.) Pursuant to a timely motion under Rule 59, Federal Rules of Civil Procedure, on January 10, 1984 the District Court filed a Memorandum of Opinion and Order amending the November 9, 1983 Order to dismiss with prejudice one of the claims which had been abandoned by Petitioner. (Respondents' Appendix at A1-A3.) Before the Court of Appeals, Petitioner did not seek to raise any of the claims which she abandoned. Nor does she seek to do so before this Court.

question for review with respect to the Ohio law ground for the decisions below; indeed, both of the "Questions Presented" in the Petition deal expressly and exclusively with the federal law doctrine of ripeness. (Petition at i.)

As the District Court observed, the Severance Agreements (providing covered employees with cash payments if their employment at Ferro terminates within two years of a "change in control," as defined) were adopted at a time when Ferro was the subject of a possible takeover attempt which presented a threat that key employees would leave Ferro rather than face the personal uncertainties associated with the situation. (Petitioner's Appendix at 7a-8a.) However, that possible takeover attempt evaporated before Petitioner filed her complaint. Both of the courts below determined upon the record, and this is not disputed by Petitioner, that the payments are contingent upon a change in control at Ferro *and* that a change in control is not presently foreseeable. (Petitioner's Appendix at 18a, 37a.)

Thus, underlying both "Questions Presented" by the Petition is the fact that the covered employees' contingent right to receive Severance Agreement payments has not presently accrued and may never accrue. One may only speculate as to whether those contingent rights ever will arise and, if they do, what the surrounding circumstances will be.

Petitioner has not and cannot present facts to support her challenge to the Severance Agreements. Instead, Petitioner has proffered speculation—her own parade of horribles as to what *might* happen. As the Court of Appeals held:

> All of this speculation serves to highlight the fact that it is still unclear how these events will play out,

> and that judicial intervention at this time would be premature, as the case is not ripe for decision.

(Petitioner's Appendix at 36a.)

SUMMARY OF ARGUMENT

This is not a case in which the Court should grant certiorari. It is futile for Petitioner to seek review of the federal law ripeness issues when there is an alternate ground set forth in the decisions below based entirely on Ohio law. This Ohio law basis for the decisions was not placed before this Court in the Petition. *See infra* n.3. In any event, this Court does not grant certiorari in order to review lower federal court determinations on questions of state law.

Moreover, the federal law ground for the decisions below involves the exercise of discretion by the District Court under the ripeness doctrine, the only question being whether the District Court abused that discretion. There is no conflict with the decisions of this Court. There is no novel question of law involved. There is no conflict among the circuits.

REASONS FOR DENYING THE WRIT

A. The Decisions Below Are Founded Upon An Alternate Ground, Based Wholly On Determination Of Questions Of State Law.

There are two independent and distinct grounds for the decisions below. First, as the Court of Appeals held under federal law:

> judicial intervention at this time would be premature, as the case is not ripe for decision.

(Petitioner's Appendix at 36a.) Second, as the Court of Appeals also held, there is an alternate ground for the decision, based wholly on questions of state law:

> In addition, as the district court pointed out, Ohio law requires as a prerequisite to any shareholder's derivative suit that the corporation sustain damage as a consequence of the allege [sic, alleged] wrong. *Barson v. Pioneer Savings and Loan Co.*, 163 Ohio St. 424, 127 N.E.2d 614 (1955). Shareholder's derivative actions are governed by Rule 23.1 of the Federal Rules of Civil Procedure, and federal courts apply the law of the state in which the company is incorporated. *Burks v. Lasker*, 441 U.S. 471 (1979), *In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075 (6th Cir. 1984). Ferro is an Ohio corporation, and, as pointed out above, Ohio law requires proof of damages to the corporation before a shareholder's derivative action can be maintained.
>
> We agree with the lower court that Ferro has sustained no damages since any payments are contingent upon a change of control and a change of control is not presently foreseeable.
>
> Therefore, *because the case is not ripe for adjudication and because the corporation has suffered no damages,* the determination of the district court is AFFIRMED.

(Petitioner's Appendix at 37a) (emphasis added.)

Unless this Court reviews and reverses *both* the federal law ground and the alternate Ohio law ground, this Court cannot provide Petitioner with any meaningful relief from the judgments below. Even if the courts below did not correctly exercise their discretion under the federal law doctrine of ripeness (which we vigorously deny), the

Ohio law ground alone mandates affirmance of the lower courts' judgments dismissing Petitioner's case.[3]

This Court has consistently declined to review lower federal courts' decisions on state law questions. In *Cort v. Ash*, 422 U.S. 66 (1975), a shareholder's derivative suit, the plaintiff shareholder had dropped a pendent state law claim after the district court held that Pennsylvania law required him to post security for expenses as a prerequisite to proceeding with the state law claim. In refusing to reinstate the state law claim, the unanimous decision of this Court explained that:

> [T]his Court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed, our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 462 (1967); *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534 (1949).

Id. at 73 n.6. *See also Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800 (1985); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("It is our practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' "); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963); *General Box Co. v. United*

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3. Both of the "Questions Presented" in the Petition for Writ of Certiorari deal expressly and exclusively with the federal law doctrine of ripeness. Accordingly, pursuant to Rule 21.1(a) of this Court, the Ohio law ground is not properly before the Court for consideration. Since Petitioner has failed to place issues before this Court which the Court must resolve if it is to provide Petitioner with meaningful relief, the Petition for Certiorari should be denied.

States, 351 U.S. 159, 165 (1956) ("We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here."); *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 708 (1949) (same); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . .").

The granting of certiorari here, therefore, necessarily would involve this Court in a review of the lower courts' determinations of questions of Ohio law. Such determinations are best left to the "district courts and courts of appeals [which] are better schooled in and more able to interpret the laws of their respective States." *Brockett, supra*, 105 S. Ct. at 2800. On this ground alone, the Petition for a writ of certiorari should be denied.

B. The Decisions Below Are Wholly Consistent With The Decisions Of This Court On Ripeness.

Petitioner's vain attempt to create an issue possibly worthy of certiorari (albeit only on the federal law ground) is founded on the premise that the District Court, although affirmed completely by the Court of Appeals, misapplied its discretion under the ripeness doctrine.[4] As the Court well knows, in deciding questions of ripeness, its prior decisions hold that two principal factors must be considered:

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4. Petitioner also suggests that the doctrine of ripeness is not applicable unless a case involves a constitutional claim, a challenge to governmental action, or an attack on state legislation. (Petition at 14-15.) However, the distinguished treatise relied upon by Petitioner squarely contradicts such assertion. 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 2d §3532.1 at 120-21 (2d ed. 1984).

> The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967); *see also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). The decisions by both of the courts below certainly are well within the zone of discretion established by this Court's decisions on ripeness.

Initially, we note that Petitioner has conceded by her failure to argue the point that the issues hardly are fit for judicial decision. Under Ohio law, a trier of fact addressing the merits raised by Petitioner's claims would be required to determine if the Severance Agreements constitute "reasonable compensation." Ohio Revised Code Section 1701.60(A)(3) (Respondents' Appendix at A5-A6). *See, e.g., Murrell v. Elder-Beerman Stores Corp.*, 16 Ohio Misc. 1, 239 N.E.2d 248 (C.P. Mont. Cty. 1968) (under Ohio Revised Code Section 1701.60(A)(3), a pension adopted for the benefit of a company's president/chairman held valid when challenged after a change in control and when payments were due).

What facts has Petitioner proffered (after her extensive discovery efforts) to support the contention that these Severance Agreements are unreasonable? As the District Court found (and the Court of Appeals agreed), this lawsuit was commenced and it has been maintained during a time when there has been no actual or threatened change in control of Ferro. Thus, Petitioner has sought to challenge the Severance Agreements now in spite of the fact that no covered employee has had any expectation of receiving payments under the Severance Agreements. (Petitioner's Appendix at 18a, 37a.) For this reason, instead of being able to offer *facts* in support of her allegations atttacking

the Severance Agreements as unreasonable, Petitioner has proffered to the District Court, the Court of Appeals, and now this Court only speculative scenarios (for example, that employees will receive benefits after being fired for cause, or that employees will receive benefits while disclosing Ferro's proprietary information to its competitors). (Petition at 6-7.)

This rampant speculation was a primary reason for the decisions by the courts below to exercise their discretion to dismiss the Severance Agreement claims without prejudice. As the Court of Appeals commented:

> The fact that all sides have tended to speculate as to the future course of events also supports the district court's decision to decline jurisdiction at this time. Plaintiff suggests that a fabricated contractual "change in control" might be brought about by the officers themselves solely to collect severance benefits. The district court, on the other hand, suggested that a new board of directors might be inclined to challenge the validity of these payments on their own, or that the directors of Ferro might decide to alter significantly or even eliminate the current severance agreements before any change in control occurs, thus obviating the need for court intervention. All of this speculation serves to highlight the fact that it is still unclear how these events will play out, and that judicial intervention at this time would be premature, as the case is not ripe for decision.

(Petitioner's Appendix at 36a.) In short, the courts below correctly held that the claims should not be adjudicated until they are based on fact rather than fancy.

Although she has no issues presently fit for adjudication, Petitioner speculates that she has been precluded by the decisions below from challenging the Severance

Agreements "at any time" in the future and, accordingly, that she has suffered the type of hardship which favors present resolution of her claims. (Petition at 16-17.) Petitioner's claim of hardship is a red herring.

First, the District Court expressly dismissed the Severance Agreement claims *without prejudice*. (Petitioner's Appendix at 25a-27a.) In affirming, the Court of Appeals expressly held that "judicial intervention *at this time* would be premature, as the case is not ripe for decision." (Petitioner's Appendix at 36a) (emphasis added.) Thus, by their terms, neither of the decisions below perpetually bars litigation of the issues.

Second, Petitioner still will be a Ferro shareholder *after* a contractually-defined "change in control" occurs, unless she decided voluntarily to sell her ten shares.[5] As both courts below found, the Severance Agreements provide that a "change in control" shall be deemed to have occurred if (i) any person or group acting in concert becomes the beneficial owner of 25% of Ferro's then outstanding voting securities, or (ii) if certain changes occur to the composition of the board of directors over the course of two consecutive years. (Petitioner's Appendix at 9a n.2, 29a n.1.) Thus, it is wholly within Petitioner's power to continue as a Ferro shareholder should either or both of the events occur which constitute a change in control and, therefore, to continue to be in a position to

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5. It seems reasonably certain that Petitioner will hold on to her ten Ferro shares so long as the potential of further litigation exists. As the record in the court below establishes, Petitioner is or has been plaintiff in twenty derivative or class actions *in addition* to this case. No less than fourteen derivative or class actions against company directors (including the instant case) were filed during 1982 *alone* in courts from Maine to California with Petitioner named as plaintiff. Petitioner's penchant for litigation was commented upon in *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 65 n.1 (N.D. Ill. 1982).

file a new shareholder's derivative suit challenging the Severance Agreements should her posited claims ever become ripe.[6]

Third, Petitioner will have ample opportunity to file another case if a merger of Ferro into another company should ever be proposed. Such a merger could not be effective unless and until the merger agreement had been adopted at a meeting of shareholders by the holders of at least two-thirds of Ferro's common stock. Ohio Revised Code Sections 1701.78(D), 1701.78(F) and 1701.79(D). (Respondents' Appendix at A6-A13.) Petitioner would be provided with advance notice of the meeting and its purpose. Ohio Revised Code Section 1701.41(A). (Respondents' Appendix at A4.) Thus even if a tender offer for Ferro stock were made and were successful and were to lead to a proposed merger, the provisions of Ohio law provide Petitioner with ample opportunity, while she is still a Ferro shareholder, to file suit and seek immediate injunctive relief to bar payments under the Severance Agreements.

Petitioner takes another tack in arguing that the unavailability of escrowed funds for unrestricted corporate use constitutes harm. This contention is contrary to a purely factual determination by the District Court with which the Court of Appeals agreed. As stated by the Court of Appeals:

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6. In arguing present "hardship," Petitioner's focus is askew. The cause of action she seeks to protect is not hers, but *Ferro's*. As Rule 23.1, Federal Rules of Civil Procedure plainly states, "a derivative action [is] brought by one or more shareholders . . . to enforce a right of a corporation. . . ." Thus, even if Petitioner ultimately becomes disqualified from representing the interests of the corporation, the cause of action now posited by Petitioner will continue to belong to the corporation; it may be pursued (or not pursued) if ever it becomes ripe, by those who are then responsible for the company's governance or, if they demur, by any shareholder. *See* 3B J. Moore & J. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23.1.16[1] (2d ed. 1985).

> The district court correctly concluded that the damage resulting from tying up these funds is nominal at best, as the corporation continues to receive a healthy return on its investment. These funds have not been lost to the corporation, but are actually being put to good use.

(Petitioner's Appendix at 35a-36a.)

This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Superintendent v. Hill*, 105 S. Ct. 2768, 2777 (1985) (Stevens, J. concurring in part and dissenting in part). Moreover, "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See also Berenyi v. District Director*, 385 U.S. 630, 635 (1967).

The findings below of only nominal damage, and some benefit, stand in sharp contrast to decisions of this Court where issues have been held not ripe for review, despite a present loss to plaintiff. Illustrative is *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), wherein electric utilities challenged two separate sections of a California statute on the grounds that they were pre-empted by the Atomic Energy Act. Significantly, both the District Court and the Ninth Circuit Court of Appeals held that *each* of the challenged sections imposed a direct burden and injury upon the utilities (by causing them to cancel plans to build nuclear plants), thereby giving them standing to maintain the suit. But, as the Ninth Circuit Court of

Appeals recognized, 659 F.2d 903 at 915, the fact of direct harm is not conclusive on the question of ripeness. To decide whether the issues are fit for present adjudication, the *Abbott* test, *see infra* p. 9, must be separately undertaken.

Despite the immediate impact and harm upon the utilities imposed by both of the challenged sections of the California Act, this Court held that the utilities' challenge to one of the sections (which provided that no additional atomic plants could be built until the California Energy Commission determined that there will be adequate interim storage of spent nuclear fuel) was not ripe for adjudication.

In performing the *Abbott* test, this Court implicitly found that the harm caused the utilities by refusing present adjudication of the "interim storage" provision was *outweighed* by the factor of uncertainty of future events:

> As the Court of Appeals explained, because "we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate," judicial consideration of this provision should await further developments.

461 U.S. at 203 (footnote omitted). *See also Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967) (issues not ripe although manufacturers faced suspension of certification of color additives which, in turn, would prohibit shipment of their products in interstate commerce).

Petitioner's final argument is that the Sixth Circuit misread *Mills v. Esmark*, 544 F. Supp. 1275 (N.D. Ill. 1982). Actually, the Court of Appeals quoted (Petitioner's Appendix at 36a) the following passage from *Mills*:

> Plaintiffs also fail to allege that any merger or acquisition of Esmark has taken place since the [severance] agreements became effective. Whether any future merger or acquisition would result in a waste or gift of corporate assets because of these purported agreements is a matter not ripe for consideration here.

Id. at 1290-91.

This holding from *Mills* hardly tends to support Petitioner's contention that "[i]n general, the judiciary has decided the legality of such fully executed [severance] agreements prior to any change in control." (Petition at 4.) We have searched in vain for a citation in the Petition to any decision which supports the Petitioner's assertion. Moreover, even if such a decision exists, if rendered under the circumstances of the instant case where employees' contingent rights to payments under the agreements have not accrued and may never accrue and the objections to the agreements are based only on speculation, such a case would have been wrongly decided and would be contrary to this Court's prior decisions.

There is no important question of federal law presented by the Petition. The courts below have not departed from the established principles for determining ripeness and no issue is raised in the Petition of any importance other than to the parties to this lawsuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed January 10, 1984)

CASE NO. C82-3148

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANN BROWN,
Plaintiff,

v.

FERRO CORP., *et al.*,
Defendants.

JUDGE JOHN M. MANOS

MEMORANDUM OF OPINION AND ORDER

On November 12, 1982, plaintiff, Ann Brown, filed the above-captioned derivative action against defendants, Ferro Corporation (Ferro) and its eleven (11) directors. In her complaint, Brown challenged four decisions made by the directors of Ferro: (1) the adoption of a Severance Agreement Program that would provide payments to certain key employees if their employment terminates within two years after a change in control, (2) the amendment of Ferro's Incentive Compensation Plan, (3) the adoption of a Performance Share Plan, and (4) the repurchase of a 22.4 percent block of Ferro's shares from Crane Co. Brown alleged that these decisions served no

legitimate purpose of Ferro or its shareholders. On July 22, 1983, the defendants filed a joint motion for summary judgment or, in the alternative, for dismissal. On August 8, 1983, Brown filed a response to the defendants' motion in which she indicated that she only wished to pursue her claims for damages and rescission based upon the adoption of the Severance Agreement Program. Memorandum of Plaintiff in Opposition to Joint Motion of Defendants at 2. On November 9, 1983, this court granted the defendants' motion to dismiss with respect to the adoption of the Severance Agreement Program, and dismissed Brown's remaining claims pursuant to Fed. R. Civ. P. 41(a)(2). The case is currently before the court on the defendants' motion to amend the Memorandum of Opinion and Order filed on November 9, 1983, in order to dismiss *with prejudice* plaintiff's claim concerning the repurchase of Ferro's shares from Crane. For the reasons that follow, their motion is granted.

As indicated above, after the defendants filed their motion for summary judgment on all claims, Brown stated that she would only pursue her claims concerning the Severance Agreement Program. Thus the court dismissed Brown's remaining claims under Fed. R. Civ. P. 41(a)(2), which provides in pertinent part:

> Except as provided in paragraph 1 of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

The defendants now assert that, in order to prevent the hardship of relitigating the stock repurchase claim, the

court should dismiss this claim with prejudice. They add:

> From the inception of this case through September 30, 1983, lawyers for Ferro and the Individual Defendants have devoted over 3,500 hours on this case and the two other purported derivative actions. (Rasmussen Affidavit, ¶ 3.) Given the effort and expense that has been invested in litigating the merits (or lack thereof) of this case, Ferro and its Board of Directors earnestly submit that they should not be subject to the cost and expense of relitigating the repurchase transaction all over again.

Memorandum in Support of Motion to Amend at 4. Since the purpose of Rule 41(a)(2) is to prevent voluntary dismissals that unfairly affect the other side, 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364 (1971), and since Brown has not challenged the defendants' motion to amend the court's previous Memorandum of Opinion and Order, Brown's claim concerning the repurchase of Ferro's stock should be dismissed with prejudice. *Accord Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969).

Accordingly, the court's Memorandum of Opinion and Order of November 9, 1983, are amended to the extent that Brown's claim concerning the repurchase of Ferro's stock is dismissed *with prejudice.*

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

OHIO REVISED CODE

§ 1701.41 Notice of meeting.

(A) Written notice stating the time, place, and purposes of a meeting of the shareholders shall be given either by personal delivery or by mail not less than seven nor more than sixty days before the date of the meeting unless the articles or the regulations specify a longer period: (1) to each shareholder of record entitled to notice of the meeting; (2) by or at the direction of the president or the secretary or any other person required or permitted by the regulations to give such notice. If mailed, such notice shall be addressed to the shareholder at his address as it appears on the records of the corporation. Notice of adjournment of a meeting need not be given if the time and place to which it is adjourned are fixed and announced at such meeting.

(B) Upon request in writing delivered either in person or by registered mail to the president or the secretary by any persons entitled to call a meeting of shareholders, such officer shall forthwith cause to be given to the shareholders entitled thereto notice of a meeting to be held on a date not less than seven nor more than sixty days after the receipt of such request, as such officer may fix, unless the articles or the regulations specify a longer period for such purpose. If such notice is not given within fifteen days after the delivery or mailing of such request, or such shorter or longer period as the articles or the regulations specify for such purpose, the persons calling the meeting may fix the time of meeting and give notice thereof as provided in division (A) of this section, or cause such notice to be given by any designated representative.

1701.60 Transactions between the corporation and its directors or officers

(A) Unless otherwise provided in the articles or the regulations:

(1) No contract or transaction shall be void or voidable with respect to a corporation for the reason that it is between the corporation and one or more of its directors or officers, or between the corporation and any other person in which one or more of its directors or officers are directors, trustees, or officers, or have a financial or personal interest, or for the reason that one or more interested directors or officers participate in or vote at the meeting of the directors or a committee thereof which authorizes such contract or transaction, if in any such case (a) the material facts as to his or their relationship or interest and as to the contract or transaction are disclosed or are known to the directors or the committee and the directors or committee, in good faith reasonably justified by such facts, authorize the contract or transaction by the affirmative vote of a majority of the disinterested directors, even though the disinterested directors constitute less than a quorum; or (b) the material facts as to his or their relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon and the contract or transaction is specifically approved at a meeting of the shareholders held for such purpose by the affirmative vote of the holders of shares entitling them to exercise a majority of the voting power of the corporation held by persons not interested in the contract or transaction; or (c) the contract or transaction is fair as to the corporation as of the time it is authorized or approved by the directors, a committee thereof, or the shareholders;

(2) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the directors, or of a committee thereof which authorizes the contract or transaction;

(3) The directors, by the affirmative vote of a majority of those in office, and irrespective of any financial or personal interest of any of them, shall have authority to establish reasonable compensation, which may include pension, disability, and death benefits, for services to the corporation by directors and officers, or to delegate such authority to one or more officers or directors.

(B) Nothing contained in subdivisions (1) and (2) of division (A) of this section shall limit or otherwise affect the liability of directors under section 1701.95 of the Revised Code.

§ 1707.78 [Merger or consolidation into domestic corporation.]

(A) Pursuant to an agreement of merger or consolidation between the constituent corporations as provided in this section, a domestic or foreign corporation and, if so provided, one or more additional domestic or foreign corporations, may be merged into a surviving domestic corporation, or a domestic corporation together with one or more additional domestic or foreign corporations may be consolidated into a new domestic corporation formed by such consolidation. If any constituent corporation is a foreign corporation, the merger or consolidation must also be permitted by the laws of each state under the laws of which any constituent foreign corporation exists.

(B) The agreement of merger or consolidation shall set forth:

(1) The state under the laws of which each constituent corporation exists;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified surviving domestic corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new domestic corporation. The name of the surviving or new corporation may be the same as or similar to that of any constituent corporation;

(3) All other provisions with respect to the surviving or new corporation which would be required in original articles of a domestic corporation filed at the time of adoption of the agreement, other than the statement with respect to initial stated capital. Such provisions may vary from those in the articles of any constituent corporation;

(4) All statements and matters required to be set forth by the laws of each state under the laws of which any constituent foreign corporation exists;

(5) In the case of a merger, a statement that the directors of the surviving corporation shall continue as such or, if there are to be any changes on or before the effective date of the merger, the names of the directors. In the case of a consolidation, the names of the first directors of the new corporation;

(6) The regulations of the surviving or new corporation, or a provision that the regulations of a specified constituent corporation shall be the regulations of the surviving or new corporation, with such amendments as may be set forth in the agreement;

(7) The name and address of the statutory agent upon whom any process, notice, or demand against any constituent corporation or the surviving or new corporation may be served;

(8) The terms of the merger or consolidation, the mode of carrying them into effect, and the manner and basis of making distributions to shareholders of the constituent corporations in extinguishment of or in substitution for their shares. Such distribution may be by way of shares of any class or classes of the surviving or new corporation, cash, securities, evidences of indebtedness, other property, or any combination thereof. No such distribution shall be effected if there is reasonable ground to believe that the surviving or new corporation would be rendered insolvent thereby.

(C) The agreement of merger or consolidation may also set forth:

(1) The effective date of the merger or consolidation, which may be on or after the date of filing the certificate;

(2) A provision authorizing the directors of one or more of the constituent corporations to abandon the proposed merger or consolidation prior to filing the certificate;

(3) The terms and classifications of the directors;

(4) A statement of, or a statement of the method of determining, the fair value of the assets to be owned by the surviving or new corporations;

(5) Any additional provision permitted to be included in the articles of a newly formed domestic corporation;

(6) Any additional provision necessary or desirable with respect to the proposed merger or consolidation;

(D) To effect the merger or consolidation, the agreemust be approved by the directors of each constituent corporation, and adopted by the shareholders of each con-

stituent domestic corporation other than the surviving corporation at a meeting of the shareholders of each such corporation held for the purpose. In the case of a merger, the agreement must also be adopted by the shareholders of the surviving corporation at a meeting held for the purpose, if one or more of the following conditions exist:

(1) The articles or regulations of the surviving corporation then in effect require that the agreement be adopted by the shareholders or by the holders of a particular class of shares of that corporation;

(2) The agreement conflicts with the articles or regulations of the surviving corporation then in effect, or changes the articles or regulations, or authorizes any action which, if it were being made or authorized apart from the merger, would otherwise require adoption by the shareholders or by the holders of a particular class of shares of that corporation;

(3) The merger involves the issuance or transfer by the surviving corporation to the shareholders of the other constituent corporation or corporations of such number of shares of the surviving corporation as will entitle the holders thereof immediately after the consummation of the merger to exercise one-sixth or more of the voting power of that corporation in the election of directors;

(4) The agreement of merger makes such change in the directors of the surviving corporation as would otherwise require action by the shareholders or by the holders of a particular class of shares of that corporation.

(E) Notice of each meeting of shareholders of a constituent domestic corporation at which an agreement of merger or consolidation is to be submitted shall be given to all shareholders of that corporation, whether or not they are entitled to vote, and shall be accompanied by a

copy or a summary of the material provisions of the agreement.

(F) The vote required to adopt an agreement of merger or consolidation at a meeting of the shareholders of a constituent domestic corporation is the affirmative vote of the holders of shares of that corporation entitling them to exercise at least two-thirds of the voting power of the corporation on such proposal or such different proportion as the articles may provide, but not less than a majority, and such affirmative vote of the holders of shares of any particular class as is required by the articles of that corporation. If the agreement would have an effect which, if accomplished through an amendment to the articles, would entitle the holders of shares of any particular class to vote on the adoption of such amendment, the agreement must also be adopted by the affirmative vote of the holders of at least two-thirds of the shares of such class, or such different proportion as the articles may provide, but not less than a majority. If the agreement would authorize any particular corporate action which under any applicable provision of law or the articles could be authorized only by or pursuant to a specified vote of shareholders, the agreement must also be adopted by the same affirmative vote as would be required for such action.

(G) At any time prior to the filing of the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if authorized to do so by the agreement or by the same vote of shareholders as is required to adopt the agreement.

(H) If division (D) of this section does not require adoption of the agreement of merger by the shareholders of the surviving corporation, the approval of the agreement

by the directors of that corporation constitutes adoption by that corporation.

(I) If any constituent corporation is a foreign corporation, it shall comply with the applicable laws of the state under the laws of which it exists.

§ 1701.79 [Merger or consolidation into foreign corporation.]

(A) Pursuant to an agreement of merger or consolidation between the constituent corporations as provided in this section, a domestic corporation and, if so provided, one or more additional domestic or foreign corporations, may be merged into a surviving foreign corporation, or a domestic corporation together with one or more additional domestic or foreign corporations may be consolidated into a new foreign corporation to be formed by such consolidation in a state under the laws of which a constituent foreign corporation exists. The merger or consolidation must be permitted by the laws of each state under the laws of which any constituent foreign corporation exists.

(B) The agreement of merger or consolidation shall set forth:

(1) The states under the laws of which each constituent corporation exists, and, in the case of a consolidation, the state under the laws of which the new corporation is to exist;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified surviving foreign corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new foreign corporation. The name of the surviving or new corporation may be the same as or similar to that of any constituent corporation;

(3) All additional statements and matters with regard to the surviving or the new corporation, other than the name and address of the statutory agent, which would be required by section 1701.78 of the Revised Code if the surviving or new corporation were a domestic corporation;

(4) The location of the principal office of the surviving or new corporation in the state under the laws of which the surviving corporation exists or the new corporation is to exist;

(5) All additional statements and matters required to be set forth in such an agreement of merger or consolidation by the laws of each state under the laws of which any constituent foreign corporation exists and, in the case of a consolidation the new corporation is to exist;

(6) The consent of the surviving or the new corporation to be sued and served with process in this state, and the irrevocable appointment of the secretary of state as its agent to accept service of process in any proceeding in this state or to enforce against the surviving or the new corporation any obligation of any constituent domestic corporation, or to enforce the rights of a dissenting shareholder of any constituent domestic corporation;

(7) If it is desired that the surviving or the new corporation transact business in this state as a foreign corporation, a statement to that effect, together with a statement on the appointment of a statutory agent and with respect to service of any process, notice, or demand upon such statutory agent or the secretary of state, as required when a foreign corporation applies for a license to transact business in this state.

(C) The agreement may also set forth any additional provision permitted by the laws of any state under the laws of which any constituent corporation exists, consistent

with the laws of the state under the laws of which the surviving corporation exists or the new corporation is to exist.

(D) To effect the merger or consolidation, the agreement must be approved by the directors of each constituent corporation, and adopted by the shareholders of each constituent domestic corporation, in the same manner and with the same notice to and vote of shareholders or of holders of a particular class of shares, as is required by section 1701.78 of the Revised Code.

(E) At any time prior to filing the certificate of merger or consolidation, the merger or consolidation may be abandoned by the directors of any of the constituent corporations if authorized to do so by the agreement.

(F) Each constituent foreign corporation shall comply with the applicable provisions of the laws of the state under the laws of which it exists.

(G) If the surviving or new corporation does not desire to be licensed to transact business in Ohio, the agreement shall be accompanied by the affidavits, receipts, certificates, or other evidence required by division (H) of section 1701.86 of the Revised Code with respect to each constituent domestic corporation and, with respect to each constituent foreign corporation licensed to transact business in Ohio, the affidavits, receipts, certificates, or other evidence required by division (C) or (D) of section 1703.17 of the Revised Code.